

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER SHAWN MESTER,

Defendant-Appellant.

UNPUBLISHED

March 18, 2003

No. 230568

Oakland Circuit Court

LC No. 99-169753-FH

Before: Griffin, P.J., and Neff and Gage, JJ.

MEMORANDUM.

Defendant appeals as of right from a jury conviction of driving while impaired, third offense, MCL 257.625(3), (10), for which he was sentenced to two years' probation with the first sixty days in jail. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole claim on appeal is that the trial court erred in admitting evidence that he possessed and smelled of marijuana when he was arrested. The trial court's ruling regarding the admission of evidence is reviewed for an abuse of discretion. *People v Gould*, 225 Mich App 79, 88; 570 NW2d 140 (1997). Because the alleged error is nonconstitutional, it "is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

The evidence was admissible as part of the res gestae of the offense irrespective of MRE 404(b). *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996); *People v Coleman*, 210 Mich App 1, 5; 532 NW2d 885 (1995). The evidence that defendant smelled strongly of marijuana permitted a reasonable inference that he had been smoking the substance, and his use of marijuana could have affected his ability to drive. It also could have affected his memory, and thus was admissible for gauging his credibility. *Sholl*, *supra* at 741.

Even if the court had erred in admitting the evidence, the error was not such as to require reversal. Defendant admitted having consumed some alcohol and he failed field sobriety tests. In addition, he registered a .07 blood alcohol level approximately an hour and a half after Officer Loudon first observed him; the evidence regarding alcohol processing rates indicated that his

blood alcohol level could have been higher at the time of the offense. Given such evidence, it was unlikely that the alleged error was outcome determinative. *Lukity, supra*.

Affirmed.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Hilda R. Gage